Pacific Coast Metal Trades District Council and Seattle Metal Trades Council *and* Foss Shipyard, a Division of Foss Launch & Tug Co. (a Dillingham Company). Case 19-CB-4024

March 22, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On November 5, 1981, Administrative Law Judge Jay R. Pollack issued the attached Decision in this proceeding. Thereafter, Respondents and the Charging Party filed exceptions and supporting briefs, and the General Counsel filed a brief in response to the Charging Party's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

In their exceptions and response to the Charging Party's exceptions, Respondents request that they be awarded attorneys' fees pursuant to *Tiidee Products, Inc.*, 194 NLRB 1234 (1972), and the Equal Access to Justice Act.[3] Under *Tiidee Products*, the Board may order the payment of certain extraordinary remedies, such as attorneys' fees, if it determines that a party has engaged in frivolous litigation. We cannot conclude that the present case constitutes frivolous litigation. We note that the Administrative Law Judge's ultimate conclusion that Respondents did not violate the Act was based, in part, on his credibility resolution with respect to the testimony of John Lappin. Had the Administrative Law Judge viewed the evidence differently or made contrary credibility findings, a violation of the Act may have been established.

[1] The Charging Party has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In view of the Administrative Law Judge's conclusion that the evidence fails to establish by a preponderance of the evidence that Respondents violated Sec. 8(b)(3) of the Act, we find that it was unnecessary for the Administrative Law Judge to have ruled on the General Counsel's motion to withdraw the complaint. Therefore, we have modified the Administrative Law Judge's recommended Order, and order that the complaint be dismissed in its entirety.

[3] P.L. 96-481, Sec. 201, 94 Stat. 2325 (1980).

With respect to Respondents' request for attorneys' fees under the Equal Access to Justice Act, we find that Respondents' request is premature and otherwise not in compliance with the procedural requirements for applying for an award of fees and expenses as set forth in Sections 102.143 through 102.155 of the Board's Rules and Regulations.[4] Accordingly, we are precluded from considering Respondents' premature request for fees and expenses under the Equal Access to Justice Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, we affirm the Administrative Law Judge's finding that Respondents Pacific Coast Metal Trades District Council and Seattle Metal Trades Council, Seattle, Washington, have not engaged in unfair labor practices. Accordingly, we hereby order that the complaint be, and it hereby is, dismissed in its entirety.

[4] For example, Sec. 102.148(a) of the Board's Rules and Regulations states that an application for an award of fees and expenses must be filed within 30 days after the entry of the Board's final order in a proceeding.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge: I heard this case in Seattle, Washington, on September 17, 1981. Pursuant to an original charge and an amended charge filed against Pacific Coast Metal Trades District Council and Seattle Metal Trades Council,[1] herein collectively called the Unions or Respondents, on January 30, 1981, and February 17, 1981, respectively, by Foss Shipyard, a Division of Foss Launch & Tug Co. (a Dillingham Company), herein called the Charging Party or the Company, the Acting Regional Director for Region 19 of the National Labor Relations Board issued a complaint and notice of hearing on March 26, 1981. The complaint alleges in substance that Respondents violated Section 8(b)(3) of the National Labor Relations Act, as amended, by refusing to execute a collective-bargaining agreement with the Company. Respondents do not dispute that a collective-bargaining agreement has been reached as a result of multiemployer/multiunion bargaining. However, Respondents contend that the proper party to the contract is Foss Launch & Tug Co.

On October 20, 1981, counsel for the General Counsel filed a motion to withdraw the complaint on the ground that the legal name of the Employer is Foss Launch & Tug Co. (a Dillingham Company) and, accordingly, "Respondents cannot be legally compelled to execute a contract with a name other than the properly registered name." On October 22, I issued a Notice To Show Cause why the General Counsel's motion should not be granted. On October 26, the Charging Party filed a response

[1] The names of Respondents appear as corrected at the hearing.

to the Notice To Show Cause stating, "granting General Counsel's Motion to Withdraw Complaint will force additional and costly litigation which will continue until an Administrative Law Judge decides the merits of this dispute once and for all."

All parties were given full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.[2] Based on the entire record and from my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Foss Shipyard is a trademark and trade name of Foss Launch & Tug Co., a Washington corporation.[3] Foss Shipyard is engaged in the business of the repair of barges and tugboats in Seattle, Washington. During the 12 months preceding the issuance of the complaint, Foss Shipyard purchased and received goods and materials valued in excess of $50,000 directly from suppliers outside the State of Washington or from suppliers within the State, who received such goods and materials directly from sources outside the State. Accordingly, I find that Foss Shipyard is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answers admit, and I find that Respondents are, and have been at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Evidence*

For approximately 35 years, Foss Launch & Tug Co. has been a member of the Pacific Coast Shipbuilding and Ship Repair Association (the Association), a multiemployer association, which, *inter alia*, bargains collectively with the bargaining representatives of the employees of its employer-members, including Respondents. The Association and Respondents have been party to a series of multiemployer/multiunion collective-bargaining agreements, the most recent of which were effective by their terms from July 1, 1977, to June 30, 1980.[4] The 1980 negotiations resulted in a collective-bargaining agreement effective by its terms from July 1, 1980, until June 30, 1983. Thereafter, Respondents signed separate but identical 1980–83 agreements with every employer-member of the Association, except for the Charging Party. As stated earlier, Respondents contend that the proper party to the contract is Foss Launch & Tug Co. and not Foss Shipyard, a Division of Foss Launch & Tug Co. Thus, Respondents are willing to sign a contract with Foss Launch & Tug Co. but not with Foss Shipyard.

The Charging Party contends that the agreement is by and between the Association and Respondents and that the Unions cannot selectively decide that they do not want to sign with the Charging Party because "the Unions have already reached agreement with the Association, acting as agent of the Charging Party." Both parties agree that the contract, although unsigned, has been put into effect by the parties.

The first alleged notice to the Unions of the Company's name change occurred on April 28, 1980,[5] when the Company sent its reopener letter to the Unions on a letterhead bearing the name "Foss Shipyard, a Division of Foss Launch & Tug Co." No other reference to a name change was made to the Unions at that time. The first negotiation session occurred on May 28, 1980. The subject matter of a name change was first raised at the second bargaining session of June 12 when the minutes of the May 28 meeting were brought up for approval. Vernon P. (Jerry) Russell, manager of industrial relations for Foss Launch & Tug Co., indicated to management representatives that he wanted the Company listed as Foss Shipyard and not Foss Launch & Tug Co. Lawrence Hagen, spokesman for the Association, later raised the matter with the Unions at a full bargaining session. However, the Unions raised concerns about the name change. Again, on June 16, Stan Jansen, spokesman for the Unions, indicated that the Unions were concerned about the name change of "Foss."[6] On June 17, Hagen read to union representatives a statement given to him by Russell indicating that the "change represented a change in name only." The Unions, however, took the position that their agreement was with Foss Launch & Tug and not simply Foss Shipyard. The parties reached agreement on a collective-bargaining agreement at the end of June. However, the agreement was subject to ratification by the membership of the Unions, which ratification was rejected by a majority of the employees' voting.

Thereafter the parties recommended negotiations on July 17. On that same date, Russell and Lappin met to resolve the dispute concerning the Company's name change. The meeting between Russell and Lappin produced the following handwritten language:

> Foss Launch & Tug's shipyard is now Foss Shipyard, a Division of Foss Launch Tug. The name change [was] is J.M.L. strictly for business reasons with no intention to alter the shipyard's function or facility. [The original had "was" inserted with delete marks drawn through it.]

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[2] On the date set for the submission of briefs, I received the General Counsel's motion to withdraw the complaint. No briefs were filed.

[3] Foss Launch & Tug Co., in addition to operating Foss Shipyard, operates a launch and tugboat company. It is a wholly owned subsidiary of the Dillingham Company of Honolulu, Hawaii.

[4] There were three agreements effective during this period: an agreement covering production, repair, and maintenance employees; an agreement covering carpentry and related work; and an agreement covering electrical work.

[5] Earlier on January 30, 1980, Foss Shipyard notified the Association of its intended name change. However, Foss Launch & Tug Co. did not withdraw from the Association and remained a member of the Association at the time of the instant hearing.

[6] The Unions were concerned that by agreeing to a name change to Foss Shipyard, they might somehow be waiving their right to work performed on the Company's tugboats away from the shipyard.

Russell testified that he believed that the above language satisfied Lappin's concerns regarding the name change. Lappin, whom I credit, denied that he agreed that this language resolved the Unions' concerns. Lappin stated that he simply agreed that Russell could read this statement into the joint minutes of the negotiations and that he made a correction for the sake of grammar. The minutes of the meeting of July 20 indicate that Hagen read in the above statement. The minutes do not indicate that Lappin or the Unions joined in the statement. Subsequent events seem to corroborate Lappin's testimony that he did not agree that Russell's statement resolved the Unions' concerns over the name change.

On July 20, a tentative agreement was reached, again subject to ratification by the Unions' membership. This time, ratification was achieved and the parties met on August 15 to consummate the agreement. At the August 15 meeting, it was again agreed that Russell and Lappin would draft language to resolve the Unions' concerns over the name change and submit that language to the joint labor-management secretaries for the minutes. However, Russell and Lappin were still unable to reach agreement. Thereafter, the collective-bargaining agreement was submitted in final form and executed by the Unions with all employer-members of the Association except the Charging Party.

B. *Analysis*

Section 8(d) of the Act explicitly requires the execution of a written contract incorporating any agreement reached if requested by either party. *H. J. Heinz Company* v. *N.L.R.B.*, 311 U.S. 514, 523 (1941); *Retail Clerks International Association, and Retail Store Employees Local 322, Jack Gray and Glen Conyers, their agents (Roswil, Inc., d/b/a Ramey Supermarkets)*, 226 NLRB 80, 87 (1976). However, neither party is required to sign a bargaining agreement containing terms not previously agreed upon. The General Counsel must show not only that an agreement was reached, but that the document which Respondents have refused to execute accurately reflected that contract. *Oil, Chemical and Atomic Workers International Union and its Local 7-507 (Capitol Packaging Company)*, 212 NLRB 98, 108 (1974).

Here, the credible evidence establishes that Respondents and the Company never had a meeting of the minds with regard to the identity of the party to the contract, on the employer side. However, in collective bargaining, unlike the common law of contracts, a party does not have the right to select and determine with whom he will contract. The employer must contract with the exclusive collective-bargaining representative of its employees and the union, if it is an exclusive collective-bargaining representative, must contract with the employer of the unit employees it represents. Freedom of contract relates to the terms of the agreement and, once an agreement is reached, the parties are not free to refuse to embody it in a signed contract. *H. J. Heinz, supra.*

The applicable law as set forth above leads to the conclusion that the Unions cannot refuse to sign the contract with the employer of the bargaining unit employees. Here, the record reveals that the Unions are willing to sign with the Employer of the unit employees under that Employer's lawful name; i.e., the name registered with the State of Washington, the State of incorporation. The evidence shows only that Respondents have failed to sign a contract with an assumed name of the Employer. Thus, the General Counsel and the Charging Party have failed to establish by a preponderance of the evidence that Respondents have violated Section 8(b)(3) of the Act. As stated above, the General Counsel seeks to withdraw the complaint on this basis.

Moreover, common law principles tend to support the conclusion that Respondents have not violated the Act. Under common law principles, there is an implied covenant of good faith and fair dealing between the parties to a contract. While essential terms of a contract on which the minds of the parties have not met cannot be supplied by the implication of good faith and fair dealing, it does not appear unreasonable to expect a contracting party to reveal to its counterpart its legal name and to execute a contract under that name.

Finally, contrary to the argument of the Charging Party, a different result is not reached by analyzing the case under the principles of multiemployer bargaining.

An employer that wishes to withdraw from multiemployer bargaining must do so prior to negotiations, or with the assent of both the union and the multiemployer association of which it has been a member. See, e.g., *Charles D. Bonanno Linen Service, Inc.*, 243 NLRB 1093 (1979), enfd. 630 F.2d 25 (1st Cir. 1980); *Teamsters Union Local No. 378, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Capitol Chevrolet Co.)*, 243 NLRB 1086 (1979). The undisputed evidence is that Foss Launch & Tug Co. was a member of the Association for many years and continued to be a member of the Association at the time of the instant hearing. That evidence clearly establishes that the Unions never consented to any change in that membership. Thus, Foss Launch & Tug Co. was bound by the agreement reached by the Association. Accordingly, Respondents cannot be found to have violated the Act by insisting on an agreement with Foss Launch & Tug Co. as opposed to Foss Shipyard.[7]

Upon the foregoing findings of fact, and the entire record, I make the following:

CONCLUSIONS OF LAW

1. Respondents are labor organizations within the meaning of Section 2(5) of the Act.

2. The Charging Party is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

3. The evidence fails to establish by a preponderance of the evidence that Respondents violated Section 8(b)(3) of the Act, as alleged in the complaint.

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[7] I do not consider Respondents' argument that the Company's refusal to sign the contract as Foss Launch & Tug Co. constituted bad-faith bargaining because there is no case against the Company before me for decision. The Unions did file a charge in Case 19-CA-12735 alleging a refusal to bargain in good faith against the Company but that charge was dismissed by the Regional Director on September 26, 1980.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[8]

It having been found and concluded that Respondents Pacific Coast Metal Trades District Council and Seattle Metal Trades Council have not engaged in unfair labor practices, the General Counsel's motion to withdraw the complaint is granted and the case closed.

[8] All motions inconsistent with this recommended Order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.